Supreme Court, U.S.
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No. 99-2037

IN THE
Supreme Court of the United States

THE WOODHAWK CLUB CONDOMINIUM OWNERS ASSOCIATION, *et al.*,

Petitioners,

v.

THE CITY OF MAYFIELD HEIGHTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

Petitioners

The Petitioners, Woodhawk Club Condominium I Owners Association and Woodhawk Club Condominium II Owners Association (hereinafter collectively referred to as "Woodhawk"), are not-for-profit corporations organized and existing under the laws of the State of Ohio. Woodhawk I provides a corporate entity for 236 condominium unit owners. Woodhawk II provides a corporate entity for 72 condominium unit owners. Woodhawk is located in the City of Mayfield Heights, County of Cuyahoga and State of Ohio. The Declaration of Condominium Ownership and Bylaws for Woodhawk I and II are recorded at Volume 15622, Page 65 *et. seq.* and Volume 93721, Page 5 *et seq.*, respectively, of the Cuyahoga County Deed Records.

Respondents

Respondent, the City of Mayfield Heights (hereinafter referred to as "the City") is a Municipal Corporation organized and existing under the laws of the State of Ohio. The City is a suburb of Cleveland with approximately 20,000 residents. The City's housing stock comprises 5,000 single family residences and 5,000 two-family ("duplex") residences. The remaining 5,000 residences are made up of multi-family condominiums and/or apartments.

Respondent, Mayor Margaret A. Egensperger, is the duly elected Mayor and Safety Director of the City, who controls and supervises all departments and divisions of the City's administration. Respondent, Andrew Fornaro, is the Service Director for the City who, before the privatization of refuse collection and removal, was responsible for directing the collection and disposal of refuse for the City.

TABLE OF CONTENTS

	Page
Parties to the Proceedings	i
Table of Contents	ii
Table of Cited Authorities	v
Restatement of the Case	1
Reasons for Denying the Writ	2
Background	2
Law and Argument	6
A. The City's Policy of Refuse Collection Does Not Violate Equal Protection	6
1. The City's Refuse Policy Is Constitutional And Is Rationally Related To Legitimate Governmental Interests	7
i. The City's Policy Is Rationally Related To The Legitimate Governmental Interest Of The Preservation Of The Health, Safety, And Welfare Of Its Residents	8

Contents

Page

ii. The City's Policy Is Rationally Related To The Legitimate Goal Of Establishing A Municipal Policy Of *Efficient Sanitation* 11

iii. The City's Policy Is Rationally Related To The Legitimate Governmental Interest Of Maintaining *Fiscal Costs* And Controlling A Municipality's Waste Disposal And Sanitation Expenditures 13

iv. Woodhawk Is Not Similarly Situated With Any Individual Or Entity Who Is Treated In A Dissimilar Manner 15

B. The Court of Appeals May, Indeed, Hypothesize and Conceptualize Facts to Support Equal Protection Rational Basis Scrutiny of the City's Policy 16

C. The Court of Appeal's Decision Does Not Require That The Respondents Provide Only Fire and Police Services Nor Does the Decision Deny to Condominium Homeowners All Other Municipal Services Such as Those Provided By the Health Department, Building Department and Department on Aging. 20

Contents

Page

D. The Court of Appeals' Decision Is Not Contrary to Accepted Standards of Appellate Review Nor Does It Usurp the Accepted Maxims of Appellate Court Power To Overturn and Modify the Findings of Fact Made by a District Judge. 21

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Bannum v. City of Louisville, 958 F.2d 1354 (1992) . 21

Beauclerc Lakes Condominium Association v. City of Jacksonville, 115 F.3d 934 (CA 11, 1997) 6, 12, 13

Blue Diamond Coal Co. v. Secretary of Health and Human Services, 79 F.3d 516 (CA 6, 1996) 7

Borman's, Inc. v. Michigan Property & Casualty Guaranty Association, 925 F.2d 160 (CA 6, 1991) 6, 19

Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (CA 6, 1997) 18

Federal Communications Commission and United States v. Beach Communications, et al., 508 U.S. 307 (1995) 18

Flemming v. Nestor, 363 U.S. 603 (1960) 17

Goldstein v. City of Chicago, 504 F.2d 989 (CA 7, 1974) 6

Haves v. City of Miami, 52 F.3d 918 (CA 11, 1995) 19

Cited Authorities

	Page
Hooper v. Bernalillo County, 472 U.S. 612 (1985) ..	19
Lyng v. Automobile Workers, 485 U.S. 360 (1988)	17
McGowan v. Maryland, 366 U.S. 420 (1961)	19
Property Owners and Managers Ass'n v. Mayor and Town Council of Parsippany-Troy Hills, 624 A.2d 1381 (1993)	10, 15
Rubin v. City of Wauwatosa, 342 N.W.2d 451 (1983)	6
Sturbridge Village Condominiums Association, Inc. v. City of Mayfield Heights, et al. (Ct. App. Cuy. Cty., Nov. 15, 1979, unreported No. 39667)	15
Thornton v. City of Allegan, 863 F. Supp. 504 (W.D. Mich. 1993)	15
399 Lincoln Associates v. City of Orange Township, 581 A.2d 1364 (1990)	14, 15
United States v. United States Gypsum Company, 333 U.S. 364 (1948)	21
United States Railroad Retirement Board. v. Fritz, 449 U.S. 166 (1980)	18

Cited Authorities

	Page
Valot v. Southeast Local School District Board of Education, 107 F.3d 1220 (CA 6, 1997)	6, 7
Zobel v. Williams, 457 U.S. 55 (1982)	19

RESTATEMENT OF THE CASE

Unfortunately, Woodhawk's "Statement of the Case" is nothing more than counsel's invective, unsupported assumptions, misinterpretation and misstatement of the facts.

On July 1, 1997, Woodhawk filed a Complaint for Declaratory Judgment and Permanent Injunction in the United States District Court for the Northern District of Ohio, Eastern Division. The Complaint alleged federal and state claims based upon allegations of Equal Protection violations. The City filed its Answer to the Complaint on July 25, 1997.

After extensive discovery was completed, a trial on the merits was held on August 11, 1998. The District Court held in favor of Woodhawk on all claims. In an Order and Judgment dated August 26, 1997, the District Court held that the City's policy of refuse collection and disposal was unconstitutional and declared same null and void. Further, the City was restrained and enjoined from further failing, refusing, or neglecting to pick up and collect Woodhawk's refuse. The City was ordered to commence collection of Woodhawk's refuse in a reasonable time not to exceed three months from the date of entry of the Order. The City was also ordered to pay Woodhawk $26,000 for "damages" sustained.

An Appeal to the Sixth Circuit followed on September 22, 1998. Subsequent to the Briefing Schedule, Oral Argument was held on December 14, 1999. The Sixth Circuit reversed the decision of the District Court in an Unpublished Opinion dated February 3, 2000. Woodhawk's Petition for Rehearing En Banc was denied on March 24, 2000. This Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE WRIT

Woodhawk has not articulated or demonstrated any compelling reason for granting Certiorari and its Petition should be denied. Notwithstanding Woodhawk's imaginative forecasting, the Court of Appeals' decision will not "allow municipalities to discriminate against single family homeowners who own condominiums in favor of other single family residences who do not own condominiums." The Court of Appeals' holding was proper in all respects and does not call for a review by this Court.

In reality, the Court of Appeals' decision will simply allow municipalities to make sound and reasoned distinctions and establish administrative policies which are rationally related to legitimate governmental interests, all in line with the Equal Protection Clause.

BACKGROUND

To begin with, Woodhawk completely misstates the City's Policy in order to intensify their argument. In point of fact, when accurately stated, the City's Policy and distinction are absolutely constitutional.

In the 1960's the City of Mayfield Heights (through then Mayor, Ross C. DeJohn and the city council at the time) created the present administrative/legislative policy which provides for the City's collection of refuse, snow plowing, road repair and city maintenance services for all single family and duplex (two family) residences that directly abut public dedicated roadways, but not for residences, condominiums and/or multi-family apartment buildings **that do not directly abut public dedicated roadways within the City**. The

Policy was adopted after due deliberation and consideration by the City, its administrative and legislative body. Furthermore, consistent with City's Policy of not collecting refuse from the residences located on private, non-dedicated roadways, the City does not plow or remove snow, repair or maintain the roads therein.

Woodhawk's developer, Zaremba Builders (hereinafter referred to as "Zaremba"), approached the City in approximately 1980, through its relevant committees, commissions and boards, and applied for project approval. Zaremba presented full and complete architectural plans and drawings which depicted the entire project. The City's initial consideration was the existing zoning. The existing zoning classification *did not allow for the proposed Woodhawk project.* Thus, the developer applied for and received a zoning variance from the City.

Subsequent to receiving their zoning variances, Zaremba requested the right to be exempted from the City's Building Code Standards regarding building setbacks from roadways, exclusion of sidewalks, exclusion of tree lawns, and reduction of right-of-way width requirements to accommodate the configuration and density requests. The incentive for the City's compromises was Woodhawk's absolute assurance that the City would have no service maintenance obligations on these non-dedicated streets which do not meet dedication standards. "City maintenance services" include rubbish removal, snow plowing, and roadway maintenance. The City's Planning and Zoning Commission minutes reflect that Woodhawk represented that it would be totally private and require no City maintenance services.

Woodhawk is a community with children as well as many senior citizens. Further, Woodhawk admits that the traffic flow is similar to other City roadways. To their benefit and desire, the Woodhawk development resulted in private streets, narrower in width than required for public streets or rights-of-way, few, if any, sidewalks and tree lawns to act as buffers for pedestrian and vehicular traffic, which are thrown together on these private roadways. Woodhawk's condominiums are located closer to the street than the other residences in the City. Clearly, Woodhawk's private condominium community was planned as (and in fact developed into) a totally private, electronically-gated and guarded enclave with eliminated public access. Another advantage Woodhawk enjoys is the fact that their traffic signs and parking regulations/practices do not conform to state law. Furthermore, due to the condition of their streets, parking is allowed on *both sides of the street, even where there are fire hydrants*. The City is completely powerless to keep order in this private community.

The fact that Woodhawk is a private, gated, secured enclave, where the unit owners retain the financial responsibility for rubbish removal, snow removal, and road maintenance and repair (in exchange for privacy and no public access), is not a secret or an undisclosed fact. Significantly, the prospective unit owner is advised of this fact in marketing presentations and promotional materials. This fact is also made known to prospective purchasers through the recorded filings of: (1) the Declaration of Condominium Ownership and Bylaws; (2) the deed covenants and restrictions; and (3) the disclosure statements, all of which clearly show that rubbish removal, snow removal and road repair/maintenance are all part of the unit owners' financial responsibility. Further, Woodhawk's common area

maintenance charge includes rubbish removal. Thus, Woodhawk's residents were (and are) well aware before their initial purchase what costs and expenses they would be (and are) responsible for.

At the time of the development of Woodhawk's project, the City considered and deliberated over fiscal and budgetary matters that impacted legitimate health, safety and welfare concerns, specifically, the impact on the City's fiscal and/or budgetary planning and the prospect of additional City revenues through taxes, with a minimal impact on City services by virtue of a prior agreement between the City and the developer.

One of the City's reasons to deny the rubbish removal, snow removal, and road maintenance services is that residents of Woodhawk must walk/ride bicycles in the roadways, thereby mixing all pedestrians with vehicular traffic. The City's mandate to protect the health, safety and welfare concerns of its Woodhawk residents, transcends the City's available liability insurance for bodily injury or damage to property. The City has a fundamental duty to keep its residents out of harms way, which it accomplishes by promulgating rational and reasonable building standards. The City requires roadways or public streets to be 50 feet in width. This ensures adequate road pavement width, as well as appropriate buffers between pedestrian and motor vehicle traffic by way of tree lawns and sidewalks. When a private community requests deviation from these standards (in exchange for privacy and the elimination of public access), it is undertaking both financial and certain other responsibilities for its residents. As such, the City loses its traffic enforcement jurisdiction, regarding traffic signage, parking and vehicle towing. When one considers the

roadways are narrower, there are no tree lawns, inadequate sidewalks, rubbish bags placed in or too near the roadway, and no place to push the snow off of the roadways, some or all of these factors contribute to risk of injury to persons and damage to private roadways, not otherwise occurring in public rights-of-way.

LAW AND ARGUMENT

A. The City's Policy of Refuse Collection Does Not Violate Equal Protection

As stipulated by Woodhawk, the right to free waste/public garbage collection is not a fundamental right of individuals. *Goldstein v. City of Chicago*, 504 F.2d 989, 991 (CA 7, 1974); *See also*, *Beauclerc Lakes Condominium Association v. City of Jacksonville*, 115 F.3d 934, 935 (CA 11, 1997). Further, although the collection of refuse is one of numerous governmental functions, its existence does not give rise to a vested right through its continuation or the creation of a "fundamental right," for purposes of equal protection analysis. *Rubin v. City of Wauwatosa*, 342 N.W.2d 451, 457 (1983). Consequently, when legislation or a classification is economic or social in nature and neither a fundamental right nor suspect class is involved, the level of scrutiny required under equal protection analysis is ***rational basis review***. *Borman's, Inc. v. Michigan Property & Casualty Guaranty Association*, 925 F.2d 160, 162 (CA 6, 1991) (emphasis added).

In equal protection analysis under the rational basis standard, *state action is presumed to be valid* and will be sustained if the classification drawn by the state is rationally related to a legitimate state interest. *Valot v. Southeast Local*

School District Board of Education, 107 F.3d 1220, 1229 (CA 6, 1997) (emphasis added). Further, the burden of showing that government action is not rationally related to any legitimate state purpose falls squarely on the shoulders of the entity challenging the action. *Id.*, *See also*, *Blue Diamond Coal Co. v. Secretary of Health and Human Services*, 79 F.3d 516, 521 (CA 6, 1996).

The City's Policy of refuse collection is analyzed under the rational basis standard. It has been established that an enactment which does not impair interests of members of any suspect or quasi-suspect class, and does not inordinately burden the exercise of any fundamental constitutional right, is tested under the least demanding equal protection standard, the rational relationship inquiry. *Id.* Under the deferential rational relationship evaluation, *legislation is presumed to be valid* and is sustained against equal protection attack, if the classification drawn by statute is rationally related to a legitimate state interest. *Id.*, at 293 (emphasis added).

Under the rational basis standard of review, the City's Policy of refuse collection and removal is constitutional and not in violation of the Equal Protection Clauses of the United States or the State of Ohio Constitutions.

1. The City's Refuse Policy Is Constitutional And Is Rationally Related To Legitimate Governmental Interests

Refuse collection and removal is a municipality health, safety, and welfare concern/consideration. The City's policy of refuse removal is rationally related to numerous legitimate governmental interests. The City's policy of non-pick up of refuse from residences which are not immediately abutting

a public right-of-way bears a rational relationship to the legitimate governmental interest of the preservation of the public health, safety, and welfare.

i. The City's Policy Is Rationally Related To The Legitimate Governmental Interest Of The Preservation Of The Health, Safety, And Welfare Of Its Residents

Woodhawk's community is located on private, non-dedicated roadways which were not built to the same specifications of public dedicated roads and rights-of-way, specifically with regard to roadway pavement, sidewalk width, right-of-way width, and tree lawns included as buffers. These factors contribute to the City's health, safety, and welfare concerns.

Woodhawk is a community with children as well as many senior citizens. Significantly, Woodhawk admits that not all of its streets have sidewalks. Notwithstanding the existence of children, adult, and senior citizen pedestrians, Woodhawk's traffic flow is similar to other City roadways. Thus, one of the City's reasons to deny the rubbish removal, snow removal, and road maintenance/repair services is that these residents of Woodhawk must walk/ride bicycles in the roadways, mixing all pedestrians, walkers, joggers, and bicycle traffic with vehicular traffic. The City maintenance vehicles would be travelling dangerously close to these pedestrians who are forced to walk, jog, run, or ride bicycles on the street. The City has a fundamental duty to keep its residents safe. The City has accomplished this by promulgating rational and reasonable building standards, standards from which Woodhawk has deviated, thereby endangering City residents.

The City's Codified Ordinances, which require roadways or public streets to be 50 feet in width, insures adequate road pavement width, as well as appropriate buffers between pedestrian and motor vehicle traffic by way of tree lawns and sidewalks. Further, although vehicles do park on the roads, a violation of the Condominium regulations, Woodhawk "does not concern itself with it." Thus, the City has a legitimate concern for the health, safety, and welfare of its residents. Moreover, the City's mandate to legislate for and protect the health, safety and welfare concerns of its Woodhawk residents, transcends the City's available liability insurance for bodily injury or damage to property.

To add to the City's concern for the health, safety, and welfare of its residents who live in Woodhawk is the fact that the City cannot enforce any traffic, parking, or towing issues, thereby placing all child, adult, and senior citizen pedestrians in grave danger with vehicular traffic. As a private development with public access eliminated, Woodhawk enjoys the advantage that their traffic signs and parking regulations/practices do not have to conform to state law. Furthermore, even with the condition of their streets, Woodhawk permits parking on *both sides of the street, even where there are fire hydrants*. The City is completely powerless to keep vehicular order in this private community.

The City does not pick up refuse on private, non-dedicated drives due to health, safety, and welfare concerns, its inability to enforce the law on these streets, and the sporadic inability of the Police Department to enter the private community. In a case almost directly on point, it was held that municipalities' ordinances which limit refuse collection service to curbside collection along public streets is constitutional as being rationally related to the legitimate

governmental interests of **ensuring safety along complexes' privately owned streets** and of reducing and controlling the cost of solid waste disposal. *Property Owners and Managers Ass'n v. Mayor and Town Council of Parsippany-Troy Hills*, 624 A.2d 1381, 1385 (1993) (emphasis added). Further, the classification between private streets and public streets results from real, and not feigned, problems inherent in collecting garbage from locations within landowner's premises, as contrasted with collections from the curbside of public streets. *Id.* Most importantly, these inherent problems with private premises include *the difficulties associated with entries onto the private property to be serviced*. *Id.* (emphasis added).

When one considers the narrower roadways, the lack of tree lawns and sidewalks as buffers between pedestrian and motor vehicle traffic, the tremendous amounts of refuse placed in or too near the roadway, and nowhere to push snow off of the roadways, it is clear that these factors contribute to damage to private roadways and an increased risk of injury to pedestrians, not otherwise occurring in public rights-of-way. The width of the right-of-way, parking requirements, distance of sidewalks from the pavement, and the presence of sidewalks and tree lawns are all health, safety and welfare factors for the City to consider.

While the City does not intend to abrogate its responsibility for safeguarding the health, safety, and welfare of Woodhawk residents, as a result of Woodhawk's choice to cloak itself in its private enclave, pursuant to the specifications demanded for its building development, the safety of its residents is now best left to Woodhawk in coordinating these maintenance services with a viable program for its residents' safety.

ii. The City's Policy Is Rationally Related To The Legitimate Goal Of Establishing A Municipal Policy Of *Efficient Sanitation*

In the 1960's the mayor and city council, in their mandate to address health, safety, welfare, and fiscal concerns, faced the issue of refuse hauling with respect to residences, multi-family buildings, apartments, and condominiums which are located on private non-dedicated roadways. After these considerations and deliberations, the City adopted *the Policy of not providing refuse removal, snow plowing, or repair of roads for any residences, multi-family condominium or apartment projects located on private, non-dedicated roadways in the City*. This Policy clearly advances the City's interest in achieving efficient sanitation, as it relates to finance, health, safety, and welfare.

The Eleventh Circuit has held an identical classification constitutional, stating that:

> The City's provision of free waste collection service only to residential premises consisting of four or fewer units was rationally related to achieving the *legitimate goal of efficient sanitation* and, thus, did not violate the equal protection rights of the condominium owners who were denied free refuse service. The City could have assumed that condominium associations were better positioned to negotiate with private sanitation services. *Beauclerc Lakes Condominium Association*, at 934-935. (emphasis added); and
>
> That the City *may have* sought to achieve the legitimate state interest in sanitation by providing,

> at no cost, waste collection service to individuals or small groups of individuals less likely to have sufficient bargaining power to obtain such services at a reasonable price satisfies rational basis scrutiny and, therefore, constitutes no violation of the Equal Protection Clause. *Id.*, at 936 (emphasis added).

Furthermore, the Seventh Circuit as well as the Wisconsin Court of Appeals have agreed with the Eleventh Circuit's holding that **efficient sanitation is a legitimate governmental interest**. Where municipalities have distinguished between single family homes and multiple unit buildings and where Cities refuse to provide rubbish collection for condominiums and multiple unit buildings, Courts upheld this distinction, finding that *it did not violate the Equal Protection Clause* on the theory that:

> The reason for the distinction is that owner(s) of large residential buildings with a greater amount of garbage have more effective bargaining power with private scavenger services than the owner of a single unit. The city's distinction between types of residential structures in providing *efficient sanitation is, in our judgment, reasonable. Goldstein*, at 992; See also *Carpenter v. Commissioner of Public Works of the City of Racine, Wisconsin*, 339 N.W.2d 608, 611 (1983) (emphasis added).

Efficient sanitation is a legitimate goal. *Beauclerc Lakes*, at 935. In this case, the City's legislative body could believe that Woodhawk, benefitting from its larger scale, generally enjoys greater bargaining power with private waste removal

services. *See Beauclerc Lakes*, at 935. In fact, this is true. The City spends approximately **$625,000** per year on refuse removal. Significantly, the monthly cost per household for refuse removal in the City is approximately **$10.25**. However, Woodhawk I and Woodhawk II residents pay **$6.70** and **$1.13** per month, respectively, for refuse removal. This Policy advances efficient sanitation practices within the City.

A government is not required to provide sanitation service to all or none. *Id.* Clearly, the City's Policy advances efficient sanitation. Woodhawk residents do not pay nearly as much as the City residents per month for refuse removal. This fact, on its own, provides a rational basis for the City's refuse Policy.

iii. The City's Policy Is Rationally Related To The Legitimate Governmental Interest Of Maintaining *Fiscal Costs* And Controlling A Municipality's Waste Disposal And Sanitation Expenditures

Not only is the City's Policy rationally related to the above health, safety, welfare, and efficiency ends, it is also related to the legitimate economic and fiscal cost concerns of the City. Based on the past representations, assurances, and promises of developers, the City has rationally budgeted and considered all of its revenues and expenses. Including the refuse pick-up of approximately 308 additional units from the Woodhawk development alone, *along with the all other apartments and condominiums in the City*, would cause an exorbitant increase in the cost and efficiency of refuse collection and removal to the City. In the face of the City's mandate for fiscal concerns, forcing the City to literally double its trash hauling budget would have a severe impact on all of the City's residents.

Fiscal and budgetary considerations of a municipality are health, safety, and welfare concerns. At the time of the development of Woodhawk, the City considered and deliberated over fiscal and budgetary matters that specifically impacted legitimate health, safety and welfare concerns. Specifically, the City considered the impact on its fiscal and budgetary planning and the prospect of additional revenues through taxes, with a minimal impact on City maintenance services by virtue of a prior agreement with Zaremba, and the extent to which the City's fiscal and budgetary consideration would be impacted (either positively or negatively) by the decision to allow the project to proceed or not.

A statement made by the District Court Judge during the trial of this matter demonstrates that the City's Policy addresses, controls and affects fiscal costs. During the Direct Examination of the City's expert, the Judge stated:

> **Other than saving the City money**, what rational basis does it have to deny some homeowners the refuse services while affording it to others?

Thus, the Trial Judge was aware that the Policy, indeed, saves the City money. Fiscal costs and administrative constraints **alone** may furnish a legitimate basis for a municipal decision. *399 Lincoln Associates v. City of Orange Township*, 581 A.2d 1364, 1366 (1990) (emphasis added). With respect to the City's considerations regarding Woodhawk and the refuse issue, the City, in addressing rational and reasonable health, safety and welfare concerns, fiscal plans, and budget concerns, made fiscal decisions based on a policy that was uniformly accepted and later

memorialized in legislation. Furthermore, administrative convenience is generally acceptable as a rational basis for municipal classification, at least where the interest affected by the classification is neither fundamental or suspect. *Id.*, at 1367; *See also*, *Property Owners*, at 546.

The City has budgeted approximately $625,000 per year on refuse removal. To mandate that the City now double this expenditure would be an economic tragedy for the citizens of the City of Mayfield Heights and in direct contravention of the legitimate governmental interest of controlling and maintaining fiscal costs.

iv. Woodhawk Is Not Similarly Situated With Any Individual Or Entity Who Is Treated In A Dissimilar Manner

Under the rational basis test, Woodhawk may succeed only if it can demonstrate that the City intentionally treated it differently than others similarly situated. *Thornton v. City of Allegan*, 863 F. Supp. 504, 508 (W.D. Mich. 1993). Moreover, even if Woodhawk is able to establish such a prima facie case, its claim will be defeated if there is a rational relationship between the dissimilar treatment and a legitimate governmental purpose. *Id.*

Woodhawk cannot establish a prima facie case. Woodhawk has not (and cannot) establish any intentional discrimination. Further, the City was acting in compliance with a court order validating the Policy as constitutional. (*See Sturbridge Village Condominiums Association, Inc. v. City of Mayfield Heights, et al.* (Ct. App. Cuy. Cty., Nov. 15, 1979, unreported No. 39667)). Thus, Woodhawk has failed to establish intentional discrimination.

Woodhawk cannot establish that it is similarly situated with individuals or entities who are receiving preferential or dissimilar treatment. The City does not provide refuse removal to any other residence located on private, non-dedicated roadways. Moreover, the City does not collect refuse from any residents whose properties can only be reached by driving on privately owned drives. Woodhawk has no evidence or facts that the City provides refuse collection for any properties located on private, non-dedicated streets.

Clearly, **Woodhawk is dissimilar** to dedicated streets in that it does not conform to requirements of: width of the right-of-way, parking, the distance of sidewalks from the pavement, and the presence of sidewalks and tree lawns. Public dedicated streets must conform to the letter of the City code. Woodhawk is dissimilar due to their status as a private, gated community which prohibits access to the general public.

Significantly, the City does not pick up refuse or provide any other City maintenance service for any residences, condominium or apartment projects that are located on private, non-dedicated roadways in the City. Thus, Woodhawk cannot establish that they are being treated differently than similarly situated individuals. All of those similarly situated with Woodhawk are treated alike.

B. The Court of Appeals May, Indeed, Hypothesize and Conceptualize Facts to Support Equal Protection Rational Basis Scrutiny of the City's Policy

Not only was the Court of Appeals correct in reversing the District Court due to the legitimate governmental interests

furthered by the City's refuse policy, the Court of Appeals correctly held that the District Court erred in failing to conceive of a rational basis.

With rational basis review, a classification comes to a Court bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negate every ***conceivable*** basis which ***might*** support it. *Lyng v. Automobile Workers*, 485 U.S. 360, 370 (1988) (emphasis added). Further, because a Court *never* requires a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. *Flemming v. Nestor*, 363 U.S. 603, 612 (1960) (emphasis added). Thus, the City's policy must be presumed constitutional and every conceivable basis to support same must be negated. In this case, the District Court failed to: (1) Cloak the City's policy with the presumption of constitutionality; and (2) Negate any conceivable basis. The decision of the Court of Appeals is in line with all applicable Supreme Court precedent and must be affirmed.

With respect to rational basis scrutiny, this Court has clearly (and recently) stated that:

> In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any* **reasonably** *conceivable* **state of facts that** *could* **provide a rational basis** for the classification. *Federal Communications Commission and United States v. Beach*

Communications, et al., 508 U.S. 307, 313 (1995) (emphasis added). See also, *Dandridge v. Williams*, 397 U.S. 471, 484 (1970).

Further, where there are "*plausible* reasons" for [legislative] action, [a Court's] inquiry is at an end. *Federal Communication Commission*, at 313-314. (emphasis added, quotations in original); *See also, United States Railroad Retirement Board. v. Fritz*, 449 U.S. 166, 174 (1980). **This standard of review is the paradigm of judicial** *restraint. Federal Communications Commission*, at 314. (emphasis added). Thus, when social or economic legislation is at issue, the Equal Protection Clause allows the state wide latitude and the Constitution presumes that even improvident decisions will eventually be rectified by democratic process. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-296 (CA 6, 1997).

With the number and type of pedestrian traffic mixed together with vehicular traffic on Woodhawk's narrow streets and the lack of parking regulations, the District Court should have conceived that a rational basis exists for the City's Policy as it relates to ***health, safety and welfare concerns.*** Further, with the present state of the City's budget and expenditures, as well as the tremendous disparity between City residents monthly cost with Woodhawk resident's monthly cost and the potential liability for personal injury exposure, the District Court should have conceived of a rational basis for the City's Policy as it relates to ***fiscal concerns*** of the City as well as ***efficient sanitation*** practices and administrative convenience.

Under rational basis scrutiny, a Court must go so far as, on its own, to conceive of a potential rational basis in order to uphold the classification. Under this test, a statutory

discrimination will not be set aside *if any state of facts reasonably may be conceived to justify it. Borman's*, at 162, (*See also*, *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (emphasis added)) The proper inquiry is whether a **conceivably** rational basis exists, not whether that basis was *actually considered* by the legislative body. *Haves v. City of Miami*, 52 F.3d 918, 921 (CA 11, 1995) (emphasis added) The actual motivations of the legislators are unimportant, and they are not required to articulate a reason for their acts. *Id.*, at 921.

The District Court failed to provide the City's policy with the presumption of constitutionality and then failed to conceive of any rational basis such as accidents, personal injuries, vehicle collisions, property damage, parking problems, efficient sanitation, or fiscal concerns. In fact, the District Court made no mention of these requirements in the Opinion. It is essential under rational basis scrutiny that the municipal policy be presumed constitutional and the Court go so far as to conceive of a set of facts which will uphold the policy. In this case, the District Court failed to follow the proper rational basis test. The Sixth Circuit's ruling in no way jeopardizes or conflicts with this Court's holdings in *Zobel v. Williams*, 457 U.S. 55 (1982) or *Hooper v. Bernalillo County*, 472 U.S. 612 (1985); the purported conflict does not exist, and review by this Honorable Court is unnecessary.

C. The Court of Appeal's Decision Does Not Require That The Respondents Provide Only Fire and Police Services Nor Does the Decision Deny to Condominium Homeowners All Other Municipal Services Such as Those Provided By the Health Department, Building Department and Department on Aging.

Woodhawk's argument that the City:

> "May now deny all municipal, tax supported services to condominium homeowners at Woodhawk, except police and fire"

is nothing more than unsupported conjecture with absolutely no support from the record or case authority. Woodhawk is simply attempting to instill panic and concern in this Court where there is (and should be) none.

Woodhawk's argument disregards a number of issues. First, in this specific case, Woodhawk has waived any City maintenance services, including refuse removal, snow removal or road maintenance. This is evident from the testimony, findings of fact and recorded documents evidencing same. Specifically, in this case, Woodhawk agreed that they would not need refuse service. In cases where distinctions are made based on non-suspect classifications, a municipal policy will be constitutional if is passes ***rational basis scrutiny***. Thus, Woodhawk's statement that "If discriminatory practice is legitimized by historical usage, then there could be no prohibition of discrimination" is absurd. The City's policy was held to be valid based on the testimony, evidence and findings of fact.

The fact that Woodhawk cites and relies on no case law with respect to this argument mandates that same be summarily disregarded and the Petition be denied.

D. The Court of Appeals' Decision Is Not Contrary to Accepted Standards of Appellate Review Nor Does It Usurp the Accepted Maxims of Appellate Court Power To Overturn and Modify the Findings of Fact Made by a District Judge.

A Court of Appeals has the absolute authority to reverse and correct a factual finding of the District Court if found to be clearly erroneous. In this case, the Court of Appeals made very detailed determinations that the District Court was incorrect and, properly, reversed the decision of the District Court Judge.

A District Court's finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Company*, 333 U.S. 364, 295 (1948). Thus, the Court of Appeals need only to have been left with a "definite and firm conviction that a mistake has been committed" in reversing a finding of fact of a District Court. *See Bannum v. City of Louisville*, 958 F.2d 1354, 1359 (1992).

In this case, the Court of Appeals correctly found and specifically detailed that the District Court was clearly erroneous ("for two reasons") in finding that Woodhawk waived and represented that they would not need city refuse collection services. First, the District Court made the factual finding that "The Declarations of Condominium Ownership

and By-Laws for Woodhawk Club and Woodhawk II are recorded in the Cuyahoga County Recorder's Office." Also, the District Court made the findings that "The condominium documents as recorded in the Cuyahoga County Records indicate that members of the condominium associations *would bear the cost of refuse service*" and there was no discussion or representation that refuse service was requested by Woodhawk. Notwithstanding these findings, the Court incorrectly held and determined that the agreement between the City and the developer did not include refuse pick-up. The Court of Appeals based this on the testimony of the former Mayor of the City (which was not considered by the District Court) and the aforementioned findings of fact (which were incorrectly disregarded by the District Court). Thus, taking all of these facts into account, the Court of Appeals held that the District Court's finding of fact was clearly erroneous.

Woodhawk opines that the Court of Appeals' decision:

> Ignores the "other testimony and evidence", and substituted its preferred decision for the District Court's Finding of Fact.

However, Woodhawk never enlightens the Court as to exactly what this "other testimony and evidence" is. The answer is simple, there is no "other testimony or evidence." The Court of Appeals made the correct decision given all of the facts and evidence.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for Certiorari.

Respectfully submitted,

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